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Supreme Court, U.S.
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No. (1) 071183 JAN 2 - 2008

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UMAR SHAFIQ,

Petitioner,

-VS.-

MICHAEL B. MUKASEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the Petitioner established his entitlement to benefits under the Legal Immigration Family Equity Act of 2000 ("LIFE Act"), § 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a, when his father entered the United States prior to December 1, 1988 when the Petitioner was a minor child, but when Petitioner did not physically enter the United States until after that date?

Parties to the Proceedings

The parties to the proceedings in the United States Court of Appeals for the Second Circuit included the Attorney General of the United States and petitioner Umar Shafiq. There are no parties to the proceedings other than those named in the petition.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

UMAR SHAFIQ,

Petitioner,

v.

MICHAEL B. MUKASEY,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Umar Shafiq, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on October 2, 2007.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit to which this petition relates was filed on October 2, 2007, and is attached as Appendix A. It is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit to be reviewed was filed on October 2, 2007. This petition is filed within 90 days of that date. Supreme Court Rule 13.1; Supreme Court Rule 29.2. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254 (1).

REGULATION INVOLVED

The regulation involved is:

8 C.F.R. § 245a.31 Eligibility.

An alien who is currently in the United States may obtain Family Unity benefits under section 1504 of the LIFE Act Amendments if he or she establishes that:

(a) He or she is the spouse or unmarried child under the age of 21 of an eligible alien (as defined under § 245a.10) at the time the alien's application for Family Unity benefits is adjudicated and thereafter;

(b) He or she entered the United States before December 1, 1988, and resided in the United States on such date; and

(c) If applying for Family Unity benefits on or after June 5, 2003,he or she is the spouse or unmarried child under the age of 21 of an alien who has filed a Form I-485 pursuant to this Subpart B.

STATEMENT OF THE CASE

The Petitioner, a native of Pakistan, was put into removal proceedings by a Notice to Appear dated March 25, 2004. The Notice alleged that he entered the United States on or about March 25, 2004. The Petitioner filed an I-485 to adjust his status based on late legalization under the LIFE Act, 8 U.S.C. §§ 1153, 1255. He claimed that, as of May 5, 1988, he was the unmarried child under the age of 21 of an alien who was legalized under 245A of the Act. After a series of hearings, the immigration judge determined that the Petitioner was not eligible under 8 C.F.R. § 245a.31 because he had not entered the United States before December 1, 1988, and by Decision dated May 13, 2005 held that the Petitioner was ineligible for LIFE Act benefits, and ordered the Petitioner removed for that reason.

On appeal to the Board of Immigration Appeals (BIA), the Petitioner argued that under the LIFE Act, because his father's domicile was in the United States, and because his father was otherwise eligible for LIFE Act relief, he could rely on his

father's domicile as a basis to adjust his status. In its opinion, the BIA rejected these arguments and adopted and affirmed the Decision of the Immigration Judge

He was ordered removed by the IJ by decision dated May 13, 2005. By opinion dated November 7, 2006, the BIA adopted and affirmed the results of the decision below. The Petitioner appealed to the United States Court of Appeals for the Second Circuit. By opinion dated October 2, 2007, the United States affirmed the decision of the BIA. This Petition followed.

REASONS TO GRANT THE PETITION

In *Rosario v. I.N.S.*, 962 F.2d 220, 224 (2d Cir. 1992), the Second Circuit held that "[a] minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile." Thus, that Court held that, for purposes of establishing entitlement to the relief of adjustment of status, a minor's domicile is the same as that of its parents, even if the minor is not physically present in the United States. *Id.* Other courts have agreed that, generally, an alien's "period of lawful domicile . . . began when his parents achieved permanent resident status when he was a child." *Cuevo-Gaspar v. Gonzales*, 430 F.3d 1013, 1024 (9th Cir. 2005); *U.S. v. Mendoza-Mata*, 322 F.3d 829, 833 n.4 (5th Cir. 2003).

Petitioner came to the United States in 2004, but was a minor child of an alien entitled to LIFE Act relief as of the operative date. It was not disputed on

this record below that the Petitioner's father came to the United States and is eligible for the LIFE Act relief, including the requirement promulgated by regulation that the applicant for such relief be physically present in the United States before December 1, 1988. Under the principle enunciated by the Second Circuit in *Rosario*, therefore, the Petitioner's domicile before December 1, 1988 for purposes of the LIFE Act should be the United States. Notwithstanding the *Rosario* principle, the Court below held that for purposes of the regulation applicable here, the agency interpreted.

Thus, the court below erred by upholding the Immigration Judge's determination that the Petitioner was ineligible under 8 C.F.R. § 245a.31 because he was not physically present in the United States prior to December 1, 1988. Under the *Rosario* principle, the Petitioner must be presumed to have been physically present in the United States as of the date of his father's presence here. Thus, to the extent his father was eligible for adjustment of status relief under the LIFE Act, the judge and BIA should have also granted him such relief.

It is a fundamental principle of our immigration law that "[a] child as defined in . . . this title shall, if not otherwise entitled to an immigration status and the immediate issuance of a visa . . .shall be entitled to the same status, and the same order of consideration . . . , if . . . following to join, the . . . . parent." 8 U.S.C. § 1153 (d). Thus, to the extent the agency's interpretation of the regulatory requirements set forth in 8 C.F.R. § 245a.31, and that of the Court below, conflicts with these

principles in the LIFE Act, it was error and should be reversed.

The Petitioner was eligible to receive benefits under the LIFE Act because his father was eligible for LIFE Act benefits for having been in the United States since before December 1, 1988. Thus, it was erroneous for the judge to have denied relief, since the effective date of the Petitioner's entry into the United States should be the same as that of his father. The judge's interpretation of the regulation was incorrect, since it fails to effectuate the underlying principles of the LIFE Act, which is to allow families to be united in immigration matters. Under these circumstances, the IJ's holding was error and should be reversed.

Moreover, the Court below erred by not considering how its decision – that "residence" was not the same as "domicile" as defined by *Rosario* and that the regulation required physical presence in the United States by the operative date – comported with the provisions of 8 U.S.C. § 1153 (d) quoted above. Since the alien was a minor child as of the operative date, his status under the statute must follow that of his parent. Thus, the Court below erred, and the decision of the United States Court of Appeals for the Second Circuit should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, ordering the Petitioner removed.

Dated: January 2, 2008

Respectfully submitted,

KHAGHENDRA GHARTI-CHHETRY
Attorney for Petitioner Umar Shafiq
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363 7th Avenue
Suite 1500
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06-5560-ag Shafiq v Keisler **MANDATE**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of October, two thousand seven.

PRESENT: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE REENA RAGGI,
Circuit Judges,
HONORABLE JED S. RAKOFF,
District Judge.[1]

UMAR SHAFIQ,
Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE,
PETER D. KEISLER,[2] ATTORNEY GENERAL,
Respondents.

A97-656-674
No.06-5560-ag

APPEARING FOR PETITIONER:
KHAGENDRA GHARTI-CHHETRY, Chhetry & Associates, P.C., New York, New York.

APPEARING FOR RESPONDENTS:
EDWARD 1. DUFFY, Attorney (Michael P. Lindemann, Assistant Director, Office of Immigration Litigation, *on the brief), for* Peter D. Keisler, United States Department of Justice, Washington, D.C.

[1] The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation

[2] Pursuant to Federal Rule of Appellate Procedure 43 (c)(2), Acting Attorney General Peter D. Keisler is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case .

ISSUED AS MANDATE NOV 27, 2007

Petition for review from the Board of Immigration Appeals.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for review of the order of the Board of Immigration Appeals ("BIA") dated November 7, 2006, is DENIED.

Petitioner Umar Shafiq, a native of Pakistan, petitions for review of a November 7, 2006 BIA order adopting and affirming the May 13, 2005 removal order of Immigration Judge ("IJ") Sarah M. Burr. See In re Umar Shafiq, No. A 97 656 674 (B.I.A. Nov. 7, 2006), aff'g No. A 97 656 674 (Immig. Ct. N.Y. City May 13, 2005). Shafiq asserts that the agency erred in finding him ineligible for relief from removal under the Family Unity Amendments to the Legal Immigration Family Equity Act ("LIFE Act"), Pub. L. 106-554 § 1504, 114 Stat. 2763, 2763A-324 (2001). Where, as here, the BIA adopts and affirms the IJ's decision with some supplementation, "we review the decision of the IJ as supplemented by the BIA." Yan Chen v. Gonzales, 417 F.3d268, 271 (2d Cir. 2005). We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

Under 8 C.F.R. §245a.31, which implements the Family Unity Amendments to the LIFE Act, certain spouses and unmarried children of aliens eligible to adjust status under 8 C.F.R. §245a.10 may obtain family unity benefits in the United States if they, inter alia entered the United States before December 1, 1988, and resided in the United States on that date.[3] See 8 C.F.R. § 245a.31(b); Family Unity Amendments to LIFE Act, Pub. L.106-554 § 1504(b), 114 Stat. 2763 at 2763A-325. Although petitioner concedes that he did not physically enter the United States until March 24, 2004, he contends that he is nevertheless eligible to receive family unity benefits under the relevant LIFE Act Amendments be-

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[3]The family unity benefits conferred upon eligible spouses and unmarried children by the Family Unity Amendments include an exemption from removal on certain specified grounds and authorization to work in the United States. See Family Unity Amendments to LIFE Act, Pub. L. 106-554§ 1504(a), 114 Stat. at 2763A-325.

cause his father's entry into the United States prior to December 1, 1998, created a legal domicile for him in this country. As the BIA correctly concluded, however, domicile is irrelevant tothe legal requirements that petitioner enter the United States before December 1, 1988, and reside in the United States on such date. See Rosario v. INS, 962 F.2d 220,224 (2d Cir. 1992) (noting that, although "a minor's domicile is the same as that of its parents," residence is "determined from the physical fact of ... living in a particular place" (emphasis added)); 8 U.S.C. §1101(a)(33) (defining "residence" as a person's "principal, actual dwelling place in fact, without regard to intent"). Because there is no record evidence that petitioner entered or resided in the United States prior to his entry in March 2004, he fails to satisfy the entry and residence requirements necessary to qualify for benefits under the Family Unity Amendments to the LIFE Act.

Accordingly, the petition for review of the BIA's November 7, 2006 order is hereby

DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
CLERK OF COURT

~*Sn.* ~

By: Oliva M. George, Deputy Clerk

U.S. **Department of Justice**
Executive Office for Immigration Review,
Board of Immigration Appeals
Office of the Clerk

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Office of the District
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New York, NY 10278

Name: SHAFIQ, UMAR(J) (R)

A97 -656-674

Date of this notice: 11/07/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr Acting Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.

Decision of the Board of Immigration Appeal
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A97-656-674 - New York Date: **NOV-7, 2006**
.In re: SHAFIQ, UMAR
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: Chhetry, Khagendra
Gharti, Esq.

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge because she correctly held that 8 C.F.R. § 245a.31 controls here. See Matter of Burbano, 20 I&N Dec. 872,874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's Conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent's arguments concerning "domicile" do not affect his 2004 entry date into the United States for purposes of LIFE Act eligibility. Accordingly, the appeal is dismissed.

~Sn. ~

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION TIJDGE
File A 97 656 674

In the Matter of
SHAFIQ, Umar In Removal Proceedings
ORDER OF THE IMMIGRATION JUDGE

The minor respondent, a native and citizen of Pakistan, arrived in the United States on March 24, 2004. Through his attorney, he has admitted that he arrived without being admitted or paroled, and thus, is removable as charged under INA Section 212(a)(6)(A)(i).

The respondents father, Mirza Shafiq Ahmed, A# 93-249-031, has an application pending to adjust status under the LIFE Act since 2002. The respondent's attorney argues that the minor respondent is also eligible to adjust status under the Family Unity provisions of the LIFE Act. However, the regulations at 8 CFR Section 245a.31 state that such eligibility requires, inter alia, that the respondent have entered the United States before December 1, 1988. Since the respondent did not enter the United States until March 24, 2004, he is ineligible for the relief requested.

As there is no other relief requested, the following order is entered:

ORDER: IT IS HEREBY ORDERED that the respondent be removed to Pakistan.

Date: *May 13, 2005*

Place: *N.Y., N.Y.*

~Sn. ~
SARAH M. BURR
U.S. Immigration Judge